

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,  
Plaintiff,

v.

BARRY HORN,  
Defendant.

NO. 2:19-cr-00035-RAJ

ORDER ON DEFENDANT'S MOTION  
FOR COMPASSIONATE RELEASE

This matter comes before the Court on Defendant Barry Horn's motion for compassionate release. Dkt. 296. Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby **DENIES** the motion for the reasons explained herein.

**I. BACKGROUND**

Mr. Horn is serving his current sentence after pleading guilty to one count of Conspiracy to Distribute Fentanyl and one count of Possession of a Firearm in Furtherance of a Drug Trafficking Crime. In his plea agreement Mr. Horn admitted that from early 2017 through early 2019 he was involved in a conspiracy with several others to distribute counterfeit oxycodone pills containing fentanyl. As part of the conspiracy Mr. Horn distributed approximately 4,000 of these pills. When law enforcement agents searched Mr. Horn's residence they recovered approximately 120 counterfeit oxycodone pills containing fentanyl, \$1,441 in currency, and a loaded pistol. Law enforcement agents recovered an additional loaded pistol in a jacket belonging to Mr. Horn. In the

1 residence agents also found a gun safe that contained three semiautomatic pistols, three  
2 assault rifles, one shotgun, one semiautomatic rifle, and hundreds of rounds of  
3 ammunition. Dkt. 90.

4 On January 24, 2020, this Court sentenced Mr. Horn to 30 months in custody, to  
5 be followed by five years of supervised release. Dkt. 240.

6 Mr. Horn is currently serving his sentence at Federal Correctional Institution  
7 Lompoc and has a projected release date of April 18, 2022.

8 On August 10, 2020, Mr. Horn filed a motion for compassionate release  
9 requesting the Court reduce his 30-month sentence to time served, suggesting that if the  
10 Court wished to impose a substitute punishment, the Court should order a reasonable  
11 period of home confinement as a condition of his five-year term of supervised release.  
12 Mr. Horn moves for compassionate release under 18 U.S.C. §3582(c)(1)(A)(i), arguing  
13 he presents “extraordinary and compelling reasons” for release based on his contention  
14 the Bureau of Prisons (BOP) at FCI Lompoc has inadequately responded to the  
15 coronavirus-19 (COVID-19) pandemic, and that he is at heightened risk of suffering  
16 further complications should he become re-infected with COVID-19 due to his  
17 underlying medical conditions, including obesity, asthma, hypertension, and the  
18 continuing health issues he is experiencing from having already contracted the virus.  
19 Dkt. 296.

## 20 II. DISCUSSION

### 21 A. Legal Standard for Compassionate Release

22 18 U.S.C. § 3582(c)(1)(A) allows a court to reduce a term of imprisonment if  
23 “extraordinary and compelling reasons warrant such a reduction” and “such a reduction is  
24 consistent with applicable policy statements issued by the Sentencing Commission.” The  
25 Sentencing Commission’s policy statement, in turn, says that a court may reduce a term  
26 of imprisonment if “the defendant is not a danger to the safety of any other person or to  
27 the community” and “extraordinary and compelling reasons warrant such a reduction.”  
28

United States Sentencing Guidelines (“USSG”) § 1B1.13. The policy statement clarifies that such reasons exist when (1) “the defendant is suffering from a terminal illness” or (2) “the defendant is suffering from a serious physical or mental condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.” USSG § 1B1.13 cmt. n.1. The policy statement also directs a court to consider the factors set forth in 18 U.S.C. § 3553(a) in deciding whether compassionate release is appropriate and what form compassionate release should take. USSC § 1B1.13 cmt. n.4.

Mr. Horn’s motion seeks a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018. As amended, § 3582(c)(1)(A) permits an inmate, who satisfies certain statutorily mandated conditions, to file a motion with the sentencing court for “compassionate release.” As relevant to Mr. Horn’s motion, the statute now provides:

(c) Modification of an imposed term of imprisonment. --The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction;

. . .

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A).

1 The relevant statute gives this Court authority to reduce a previously imposed  
 2 sentence if three requirements are satisfied: (1) the inmate has either exhausted  
 3 administrative review of the Bureau of Prison's failure to bring such a motion, or waited  
 4 until 30 days after the request was made to the warden where the inmate is housed if that  
 5 is earlier; (2) the inmate has presented extraordinary and compelling reasons for the  
 6 requested reduction; and (3) the reduction is consistent with the Sentencing  
 7 Commission's policy statement.

#### 8 **B. Exhaustion of Administrative Remedies**

9  
 10 It is undisputed that Mr. Horn has met the exhaustion requirement and that his  
 11 request to this Court is timely. Dkt. 296, Ex. 2 and 5, Dkt. 305. As the statutorily  
 12 required 30-day period has expired, Mr. Horn's motion is properly before the Court.

#### 13 **C. Extraordinary and Compelling Circumstances**

14 The Court must next determine if extraordinary and compelling circumstances  
 15 warrant a reduction of Mr. Horn's term of imprisonment. *See* 18 U.S.C.  
 16 § 3582(c)(1)(A)(i); USSG § 1B1.13.

17 The policy statement referenced in § 3582(c)(1) was promulgated by the  
 18 Sentencing Commission pursuant to the authority Congress vested in it in 28 U.S.C.  
 19 § 994. That statute provides:

20 The Commission, in promulgating general policy statements regarding the  
 21 sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall  
 22 describe what should be considered extraordinary and compelling reasons for  
 23 sentence reduction, including the criteria to be applied and a list of specific  
 24 examples. Rehabilitation of the defendant alone shall not be considered an  
 25 extraordinary and compelling reason.  
 26 28 U.S.C. § 994(f).

27 Consistent with this statute, the applicable policy statement can be found at  
 28 Section 1B1.13 of the United States Sentencing Guidelines. That statement provides:

1 Upon motion of the Director of the Bureau of Prisons under 18 U.S.C.  
 2 § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may  
 3 impose a term of supervised release with or without conditions that does not  
 4 exceed the unserved portion of the original term of imprisonment) if, after  
 considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they  
 are applicable, the court determines that--

5 (1)(A) Extraordinary and compelling reasons warrant the reduction...

6 (2) The defendant is not a danger to the safety of any other person or to the  
 7 community, as provided in 18 U.S.C. 3142(g); and

8 (3) The defendant is not a danger to the safety of any other person or to the  
 9 community, as provided in 18 U.S.C. § 3142(g); and

10 (4) The reduction is consistent with this policy statement.

11 U.S.S.G. § 1B1.13 (2019).

12 In the commentary, the Commission goes on to explain what constitutes  
 13 “extraordinary and compelling reasons” to support a reduction in sentence.

14 Specifically, Application Note 1 provides that extraordinary and compelling reasons  
 15 exist if the defendant is suffering from a serious physical or medical condition...that  
 16 substantially diminishes the ability of the defendant to provide self-care within the  
 17 environment of a correctional facility and from which he or she is not expected to  
 18 recover.” U.S.S.G. § 1B1.13 cmt.n.1.

19 Mr. Horn argues he has met his burden of showing extraordinary and compelling  
 20 circumstances exist for the Court to grant his motion for compassionate release. He  
 21 contends his health records provide evidence that his underlying health conditions of  
 22 obesity, asthma, and hypertension may hinder his recovery from COVID-19 and place  
 23 him at greater risk of further complications should he re-contract the virus. He indicates  
 24 he is experiencing the effects of having contracted the virus, including difficulty  
 25 breathing, tightness in his chest, headaches, lethargy, and sleepiness. Dkt. 296.

26 Mr. Horn is a 33-year-old man with a body mass index (BMI) of over 30.  
 27 According to his declaration, he is 5 feet 11 inches tall and currently weighs 235 pounds,  
 28 placing his BMI at 32.8. Dkt. 296, Ex. 2. A BMI above 30 is characterized as obese, and

1 is recognized by the Centers for Disease Control and Prevention (CDC) as a high risk  
2 factor for complications or death from COVID-19. Mr. Horn highlights that the  
3 Department of Justice concedes that a BMI above 30 qualifies as an “extraordinary and  
4 compelling” circumstance when combined with circumstances of the COVID-19  
5 pandemic. Dkt. 296, Ex. 1. In addition, Mr. Horn has been informed he is pre-diabetic,  
6 Dkt. 296, Ex. 2, and his medical records indicate a hemoglobin A1C level of 5.7, which  
7 puts him at increased risk for diabetes. Dkt. 298 at 15.

8 Mr. Horn indicates he has been treated for asthma since childhood and uses an  
9 inhaler. He indicates his asthma continues to be a complicating factor in his recovery  
10 from COVID-19. After he was diagnosed with the virus, he was prescribed a steroidal  
11 inhaler, in addition to the albuterol inhaler he had been using, to help reduce his  
12 continuing difficulties with breathing and the tightness in his chest. Dkt. 296, Ex. 2,  
13 Dkt. 298.

14 Mr. Horn also contends he suffers from hypertension and receives medication to  
15 treat this condition. Dkt. 296.

16 While Mr. Horn concedes that at the time of preparation of his Presentence Report  
17 in January of 2020 he indicated he believed himself to be “in good physical health,” he  
18 argues his current medical records provide evidence that his health has deteriorated and  
19 he now presents with increasing hypertension and indications of prediabetes, together  
20 with symptoms relating to the aftereffects of having contracted the virus. Dkt. 298.

21 Lastly, Mr. Horn argues the conditions at FCI Lompoc preclude him from abiding  
22 by the guidelines of the Centers for Disease Control and Prevention (CDC) relating to  
23 social distancing and sanitation, putting him at risk of re-infection and further health  
24 complications. Dkt. 296.

25 The government opposes Mr. Horn’s request for immediate release and conversion  
26 of a portion of his sentence to home confinement. The government disputes Mr. Horn’s  
27 statements set forth in his declaration regarding his weight (Dkt. 296, Ex. 2), relying on  
28 the evidence in the medical records which shows his weight as of May 27, 2020 at 220

1 pounds, placing his BMI at 30.7. Dkt. 307. While conceding his BMI of slightly over 30  
2 is a factor recognized by the CDC as placing him at high risk for serious illness should he  
3 contract COVID-19, and that such a risk factor is generally an extraordinary and  
4 compelling reason that provides the Court with a basis for a reduction in sentence, the  
5 government argues that the fact Mr. Horn has already had COVID-19 and has since  
6 recovered argues against the Court granting his motion for release. Dkt. 305.

7 The government indicates that Mr. Horn suffers from asthma, which is treated  
8 with an inhaler. Dkt. 305. With respect to his claim regarding prediabetes, the  
9 government indicates that his hemoglobin A1C result indicates he is at the low end of the  
10 range that would place him at increased risk for diabetes. Dkt. 307.

11 The government points out that Mr. Horn denied suffering from hypertension at  
12 the time he self-reported to the institution, and that some but not all of his blood pressure  
13 readings have been elevated. The order for his prescription for Clonidine upon his self-  
14 surrender indicates it was prescribed in connection with his withdrawal from opioid use  
15 and was not refilled or further prescribed. The government indicates Mr. Horn's claim in  
16 his declaration that he has recently been prescribed a new medication for hypertension is  
17 not evident in the medical records.

18 In sum, the government argues that Mr. Horn's purported medical conditions do  
19 not constitute an extraordinary and compelling reason for the Court to release him.

20 The government contends that whether Mr. Horn could re-contract the virus is  
21 speculation and remains unknown based on the current science, and indicates that Mr.  
22 Horn's claims as set forth in his declaration, Dkt. 296, Ex. 2, are not substantiated by the  
23 medical records provided to the Court. Dkt. 315.

24 Finally, the government sets forth the efforts made by the BOP at FCI Lompoc to  
25 control the virus and provide medical treatment for those who contract it through the  
26 declaration of Lawrence Cross, the Health Services Administrator for the facility. Dkt.  
27 315, Ex. B.

1 Before the Court analyzes Mr. Horn's health related concerns, the issue of the  
 2 conditions of his place of incarceration must be addressed. In reviewing Mr. Horn's  
 3 request, the Court notes that it has traditionally considered the current conditions at the  
 4 housing facility according to the BOP website. If Mr. Horn serves the balance of his  
 5 custodial time at Lompoc, the current (October 14, 2020) conditions at that facility  
 6 indicate:

7	Inmates Positive:	0
8	Staff Positive:	3
9	Inmate Deaths:	2
10	Staff Deaths:	0
11	Inmates Recovered:	736
12	Staff Recovered	16

13  
 14 This Court deferred ruling on this motion in order to secure current information,  
 15 namely, the report of the neutral inspector charged with the duties of inspecting and  
 16 making recommendations about the Lompoc facility. Dkt. 313. That report prepared by  
 17 Dr. Homer Venter is now a matter of record. While the report does not reflect glowing  
 18 conditions at Lompoc and notes the need for substantial changes, it also demonstrates  
 19 progress made by the institution since the outbreak of COVID-19. Dr. Venter's report  
 20 and findings are divided into three areas: strengths, deficiencies and recommendations.

21 The strengths of the Lompoc facility response to the virus include increased staff  
 22 screening, the creation of a dedicated unit to care for COVID-19 patients, creation of a  
 23 screening database, the expansion of testing, quarterly quality meetings, and the  
 24 abundance of cleaning solutions for personal spaces. Dkt. 317, Ex. A, at 24-25.

25 While the positive attributes of the changes at Lompoc have been noted, Dr.  
 26 Venter points out a litany of troubling circumstances that can increase the risk of serious  
 27 illness or death from COVID-19. Yet, this report does not focus on those who have  
 28 recovered from the virus. As the Doctor notes:



1           “A separate access to care issue is the lack of assessment for ongoing  
2 COVID-19 symptoms among people who have survived the infection. I spoke  
3 with many people who reported ongoing shortness of breath, pain, headaches,  
4 weakness and ringing in the ears weeks after their initial infection. The presence  
5 of these ongoing symptoms and even disability among a group of people who are  
6 classified by BOP as “recovered” reveals a lack of any system to look for these  
7 problems after a person leaves medical isolation. BOP has an obligation to assess  
8 COVID-19 patients and care for those who require physical therapy, specialty  
9 referral and other types of care during recovery.”

10 Dkt. 317, Ex. A., at 29-30.

11           With these observations, Mr. Horn should be the beneficiary of the  
12 recommendations and follow-up by Lompoc. Dr. Venter’s report, coupled with Mr.  
13 Horn’s health conditions, do not warrant a finding of extraordinary and compelling  
14 reasons for a reduction in his sentence.

15           Turning now to Mr. Horn’s specific conditions. It is undisputed that Mr. Horn’s  
16 BMI is above the threshold for having a medical condition that the CDC has identified as  
17 a COVID-19 risk factor and generally qualifies as an extraordinary and compelling  
18 reason for the Court to consider a reduction in his sentence. The Court agrees with the  
19 government that the key difference with Mr. Horn’s circumstance is that he has recovered  
20 from the virus. While he may speculate on the likelihood of a return bout of the disease,  
21 the medical science on this observation has yet to produce affirmative and persuasive  
22 evidence one way or the other and certainly not enough to warrant granting the relief he  
23 seeks. Moreover, there is evidence in the record of the fluctuation in Mr. Horn’s weight  
24 when comparing his medical records to his declaration.

25           The Court also agrees with the government regarding the host of medical  
26 conditions expressed by Mr. Horn. None of the conditions, except for diabetes, are listed  
27 as factors that are known to increase an individual’s risk of serious illness from COVID-  
28 19. At best, they are only listed as “likely” risk factors. Again, this is insufficient to  
warrant the relief requested.

1       Regarding Mr. Horn's diabetes, the medical records do show that when he was  
2 tested for the condition, the results indicated that he was at the low end of the standard  
3 that places an individual at increased risk for diabetes. This limited showing does not  
4 warrant the Court granting a reduction in his sentence for an extraordinary and  
5 compelling reason.

6       **D. Safety of Others**

7       The Court next turns to whether Mr. Horn presents a danger to the safety of any  
8 other person or to the community. *See* U.S.S.G. §1B1.13(2). In making this  
9 determination, the Court looks to the nature and circumstances of the underlying offense,  
10 the weight of evidence against him, his history and characteristics, and the nature and  
11 seriousness of the danger his release would pose to any person or the community. 18  
12 U.S.C. §3142(g).

13       Mr. Horn asserts he would not pose a danger to the community if released  
14 immediately. He indicates that he was successful on his year-long period of pretrial  
15 release, he has a stable release plan, has no criminal history other than his current  
16 conviction at issue, and he has no disciplinary record during his incarceration. He has  
17 participated in the RDAP treatment program while in custody and plans to continue with  
18 his suboxone therapy to treat his opioid addiction. Dkt. 296.

19       The government contends that the danger Mr. Horn poses to others and to the  
20 community far outweighs the reasons he presents for compassionate release. The  
21 government argues Mr. Horn's record on pretrial release is not an indicator of whether he  
22 remains a danger, and asks the Court to consider the underlying facts of his conviction,  
23 that he was involved for over a year in a conspiracy to distribute large quantities of a  
24 highly addictive and deadly drug, and that he possessed firearms to protect this drug  
25 enterprise. Dkt. 305.

26       The Court applauds Mr. Horn's effort at rehabilitation as indicated by his pretrial  
27 release performance, RDAP participation, and the absence of criminal history before the  
28

1 current offense. While these are factors, this Court may not reduce a defendant's  
2 sentence unless it finds that he is not a danger to the safety of any other person or to the  
3 community, as provided in 18 U.S.C. § (g); U.S.S.G. § 1B1.13. For this assessment the  
4 Court must consider Mr. Horn's conduct that led to him to plead guilty. Mr. Horn was  
5 involved in the distribution of a large amount of a highly addictive and dangerous drug.  
6 To protect his drugs, he maintained a loaded firearm in close proximity to the drugs, an  
7 additional loaded pistol in a jacket, a gun safe containing more pistols, assault rifles, a  
8 shotgun, another semi-automatic rifle, and hundreds of rounds of ammunition. Mr.  
9 Horn's engagement in a serious and dangerous drug trafficking scheme and firearms  
10 raises significant concerns and cause this Court to conclude that early release is not  
11 appropriate in the interest of safety to the community.

12 **E. Other 18 U.S.C. § 3553(a) Factors**

13  
14 In determining whether to grant Mr. Horn's motion for compassionate release  
15 under 18 U.S.C. § 3582(c)(1)(A), the Court must consider relevant factors other than  
16 noted above as set forth under 18 U.S.C. § 3553(a). These factors include the need for  
17 the sentence imposed, the kinds of sentences available, promoting respect for the law,  
18 providing just punishment for the offense, avoiding unwarranted sentencing disparities,  
19 and providing medical care in the most efficient manner. 18 U.S.C. § 3553(a)(2)(B, C,  
20 D); 18 U.S.C. § 3582(c)(1)(A). The Court has considered each of these factors and  
21 concludes that compassionate release is not warranted.

22 Mr. Horn posits that when this Court imposed its 30-month sentence, the Court  
23 didn't contemplate the present conditions of his confinement given the COVID-19  
24 epidemic and argues that the § 3553(a) factors weigh in favor of release. He  
25 acknowledges that while he has served only a short amount of time, his five months in  
26 custody has been far harsher than if he had served his sentence under normal  
27 circumstances. Mr. Horn contends that five months in custody is more than sufficient  
28

1 punishment for his crime and that the profound change of circumstances warrants  
2 reconsideration of the sentence this Court imposed. Dkt. 296.

3 In response, the government argues the Court weighed the § 3553(a) factors at the  
4 time it imposed Mr. Horn's 30-month sentence, pointing out it was a sentence which was  
5 half that recommended by the government and half what was available to the Court under  
6 the Sentencing Guidelines. The government reminds the Court of the sentence imposed  
7 on Mr. Horn's co-defendant and leader of the conspiracy, Rhett Irons, who receive a 15-  
8 year custodial term, and argues that releasing Mr. Horn just five months into his 30-  
9 month sentence would contravene the goals set forth in § 3553(a). Dkt. 305. The Court  
10 agrees.

#### 11 **F. Consistency with Policy Statement**

12 Last, the Court must determine whether Mr. Horn's compassionate release would  
13 be consistent with the relevant policy statement. *See* U.S.S.G. § 1B1.13(3). The policy  
14 requires the Court to make certain findings before granting an inmate's request for  
15 compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). The Court has done so  
16 with the detail contained in this order.

### 17 **III. CONCLUSION**

18 For the foregoing reasons, Defendant Barry Horn's motion for compassionate  
19 release is **DENIED**.  
20

21  
22 DATED this 14th day of October, 2020.

23  
24 

25 The Honorable Richard A. Jones  
26 United States District Judge  
27  
28